FILED
MAR 20 1995
OFFICE OF THE CLERK

No. 94-1384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD REAHARD AND ANN P. REAHARD,

Petitioners,

v.

LEE COUNTY, FLORIDA,

Respondent.

On Petiton for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION

JOHN J. RENNER,
ASSISTANT COUNTY ATTORNEY
Counsel of Record
JAMES G. YAEGER,
LEE COUNTY ATTORNEY
2115 Second Street
Fort Myers, Florida 33901
(813) 335-2236

Attorneys for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a claimant states a valid regulatory takings claim under the Fifth Amendment without first obtaining a final decision how the regulation will be applied to his property and thereafter being denied compensation under available state procedure?

LIST OF PARTIES

Petitioners, Richard Reahard and Ann P. Reahard are residents of Lee County, Florida. Respondent, Lee County is a political subdivision of the State of Florida.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

FACTUAL BACKGROUND 2

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 8

REASONS FOR DENYING THE WRIT 8

I. THIS COURT'S DECISION IN *LUCAS* DID NOT IMPLICITLY ABROGATE THE REQUIREMENTS OF A FINAL DECISION AND DENIAL OF COMPENSATION AS THE *SINE QUA NON* OF A FIFTH AMENDMENT REGULATORY TAKING CLAIM 8

TABLE OF CONTENTS - Continued

II. THE EXISTENCE OF A COMPENSATION PROCEDURE UNDER FLORIDA LAW PRECLUDES PETITIONERS' FROM ASSERTING A FIFTH AMENDMENT TAKING CLAIM IN FEDERAL COURT 12

CONCLUSION 15

TABLE OF AUTHORITIES

CASE LAW

Glisson v. Alachua County, 558 So.2d 1030 (Fla. Dist. Ct. App. 1990) *review denied* 570 So.2d 1304 (Fla. 1990) 13

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 11

Joint Ventures, Inc. v. Department of Transp., 563 So.2d 622 (Fla. 1990) 13

Lucas v. South Carolina Coastal Council, 505 U.S. ____, 112 S.Ct. 2886 (1992) 8,10,15

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) . . . . . *passim*

Martinez v. Bolding, 570 So.2d 1369 (Fla. Dist. Ct. App. 1990) *review denied* 581 So.2d 163 (Fla. 1991) 13

Palm Beach County v. Tessler, 538 So.2d 846 (Fla. 1989) 13

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 10,15

TABLE OF AUTHORITIES - Continued

Reahard v. Lee County, 30 F.3d 1412 (11th Cir. 1994) 2

Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992) 6

Reahard v. Lee County, 978 F.2d 1212 (11th Cir. 1992) 6

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 10

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985) 12

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) . . . . . *passim*

CONSTITUTIONS

U.S. Const. Art. III 8,11

U.S. Const. Amend. V . . . . . *passim*

Fla. Const. Art. X, Sec. 6 1,4

Fla. Const. Art. X, Sec. 6(a) 3

TABLE OF AUTHORITIES - Continued

STATUTES

28 U.S.C. §1254(1) 3

Section 55.03(1), Florida Statutes 5

APPENDIX

Appendix A - U.S. District Court, Middle District of Florida, Fort Myers Division, Order dated March 21, 1990 . . . . . 1a

Appendix B - U.S. District Court, Middle District of Florida, Fort Myers Division, Order dated June 16, 1993 . . . . . 4a

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

RICHARD REAHARD and ANN P. REAHARD,
Petitioners,

v.

LEE COUNTY, FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

The respondent, Lee County, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners Richard Reahard and Ann P. Reahard.

OPINION BELOW

The Eleventh Circuit Court of Appeal reversed the judgment of the trial court, which held that the application of Lee County's comprehensive land use plan to Petitioners' 40 acre mangrove wetland constituted a regulatory taking under the Fifth Amendment and Article X, Section 6 of the Florida Constitution, on ripeness

grounds. The Court's opinion is reported at 30 F.3d 1412 (11th Cir. 1994) and reproduced in the Appendix to the Petition for Certiorari (App. A).

FACTUAL BACKGROUND

In 1944, Richard Reahard's parents purchased a 540± acre tract of land in Lee County, Florida for $1,250.00. Portions of raw land were sold, a motel was built on part of the tract, a real estate office built on another part, dirt was sold as fill, a single family subdivision was developed on a portion, Reahard's parents built a home for a residence and another for rental income and Richard Reahard built his resident on a portion. The last clearing and filling of a significant nature was done prior to 1975. As of 1975, there remained only a 40± acre tract of submerged, mangrove forested wetlands. The subject parcel is a "pristine wetlands area with few environmental impacts on it" (R10-130-11 Amended Order of Taking). No permits were ever obtained to develop the wetland parcel from the federal, state, or local authorities and there was no development underway since 1975 (RX-125).

On November 16, 1984, Lee County adopted the Lee County Comprehensive Plan. The comprehensive plan was the culmination of more than a year of public meetings, workshops, and hearings during which more than 90 days of public hearing and meetings were held. One of the eight concepts that formed the basis of the comprehensive plan was the protection of natural resources. The County Commission adopted a policy to conserve, manage, and protect natural resources. The legislative policy to protect environmentally critical wetlands was implemented by the

adoption of the Resource Protection Area ("RPA") land use classification applicable to wetlands. The RPA permitted very low density residential use of wetlands - one dwelling unit per forty acres.[1]

On November 30, 1984, Petitioner Richard Reahard inherited the 40± acre wetland. There is no dispute that the property is "a pristine wetlands area" (R10-130-11, Amended Order of Taking on Remand) and properly classified as Resource Protection Area.

JURISDICTION

Petitioners seek to invoke the discretionary jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions cited by Petitioners, Respondent submits the following to this Court:

Article X, Section 6(a) of the Florida Constitution provides in pertinent part: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner..."

STATEMENT OF THE CASE

On September 1, 1989, without first obtaining a final decision how the regulation would be applied to their parcel, Petitioners filed suit in Florida Circuit Court

---

[1]Petitioners misstate that Reahards' property is the only property in Lee County designated as Resource Protection Area (Petition for Writ p.10). Approximately 140 square miles of wetland acres are so designated in Lee County (D. Ex. 3).

alleging the application of the RPA land use classification to their 40± acre mangrove wetland constituted a regulatory taking of their property in violation of the Fifth Amendment to the United States Constitution and Article X, Section 6 of the Florida Constitution. Lee County answered the Complaint alleging failure to exhaust administrative remedies, that the claim was not ripe and the statute of limitations bars the claim. A petition to remove the case to federal court was filed by Lee County and Petitioners consented to removal (R1-3; R10-130-13).[2] Lee County moved to strike Reahards' claim for attorney's fees and demand for jury trial. The trial court denied the motion on the ground the complaint asserts a state inverse condemnation claim as well as a federal constitutional claim, and Florida inverse condemnation law permits jury trial and attorney fees (R1-9). After the case was filed and in order to cure the obvious finality defect, Reahard applied for a determination to develop a 127 lot single family home subdivision on the 40± acre wetland. A determination was made that four homes could be built on portions of the tract. Reahard appealed this determination to the Lee County Commission. On September 19, 1990, the Lee County Commission rendered its final decision regarding the application of the RPA to Reahards' property and approved development of a single family home on the site.

The case was tried before a Magistrate on the issue of whether a taking occurred as a matter of law. The

---

[2]Petitioners assert they were prevented from pursuing the available state court remedy because Lee County removed the case to federal court. In addition to omitting the fact that Petitioners consented to removal, Petitioners offer no authority that removal precluded Petitioners from pursuing a state court remedy.

Magistrate concluded the development approval of one single family home constituted a taking of property (R2-56). The Magistrate Judge concluded, without any findings or analysis, that as a result of the mere adoption of the Lee Plan in 1984, there was a substantial deprivation of the value of Plaintiffs' property resulting in a taking. Lee County appealed the order finding a taking but the appeal was dismissed as premature and trial set to determine the amount of compensation.

The issue of compensation was tried before a jury in May, 1991. Despite not possessing, or even applying for any development approvals necessary to destroy a 40± acre pristine wetland, and over Lee County's objections, Reahard presented a valuation case to the jury based upon speculation that a 24-126 lot subdivision could be developed upon the filled 40± acre mangrove wetland. A verdict of $700,000 was returned and the Magistrate entered judgment for $700,000 plus interest at 6.07% accrued from December 21, 1984, the date the comprehensive plan became effective (R6-93). Reahard filed a motion to amend the judgment to apply the interest rate of 12% which is the statutory rate under Section 55.03(1), Florida Statutes (R6-95). The Magistrate amended the judgment to include the 12% interest rate applicable to Florida state court judgments (R10-97). Lee County appealed the order of liability and the Amended Final Judgment on June 21, 1991.

The Eleventh Circuit Court of Appeals vacated the judgment because the Magistrate misapplied the legal standard applicable to partial takings and wholly failed to make adequate factual findings necessary to support the conclusion that a taking had occurred, *Reahard v. Lee*

County, 968 F.2d 1131 (11th Cir. 1992) (App. D). The Court remanded the case back to the Magistrate for new proceedings consistent with the Court's opinion.

On September 8, 1992, the Magistrate called a status conference at which time the Magistrate announced that "the ruling of the Court of Appeals hasn't changed my opinion one iota" (R18-120). The Eleventh Circuit Court of Appeals issued a supplemental opinion instructing the Magistrate to revisit the issue of ripeness [*Reahard v. Lee County*, 978 F.2d 1212 (11th Cir. 1992)]. On January 22, 1993, the judgment of the Appeals Court was filed in the trial court.

On remand, the Magistrate entered his Amended Order of Taking Following Remand (R10-130). The Magistrate concluded that Reahards' 126 lot subdivision would not likely be permitted but a 41 lot subdivision plan would have "surfaced" and probably would be permitted which would greatly increase the property's value (R10-130). The Magistrate further concluded that the federal takings claim was ripe because Florida did not provide a compensation remedy on the date of removal in October, 1989. Even if the Magistrate correctly disregarded Florida's inverse condemnation jurisprudence, the takings claim was not ripe in October, 1989 for lack of finality. While the Magistrate noted that Reahards obtained a development order consistent with the Lee Plan which permitted construction of a single family home, thereby obtaining a final decision as to the applicability of the regulation to their property, the order did not include the date the final decision was made. This date was September 19, 1990 (Plaintiff's Ex. 22). Thus, any alleged taking under the Fifth Amendment accrued, under the finality

prong, on September 19, 1990. Neither the date suit was filed nor the date the case was removed to federal court are relevant to the determination whether a Fifth Amendment takings claim is ripe for adjudication.

Subsequent to the entry of the Amended Order of Taking Following Remand, the Magistrate entered an Order Reinstating the Final Judgment over the objections of Lee County (R10-132). Lee County moved to alter or amend the final judgment specifically objecting to the award of prejudgment interest and its calculation at 12%, the statutory rate under Florida statute, on the basis that if there was no Florida compensation remedy for purposes of ripeness of the federal taking claim, how can Florida remedies apply?[3] (R10-135) The Magistrate held that in April 1990, "subsequent to removal," the Supreme Court of Florida confirmed the availability of a Florida inverse condemnation remedy and the Magistrate adjudicated a Florida inverse condemnation claim as well as a federal Fifth Amendment taking claim (R10-143).

Once again Lee County appealed to the Eleventh Circuit Court of Appeals. The Court reversed the decision of the Magistrate on the grounds the federal taking claim was not ripe for adjudication due to the existence of an adequate state compensation remedy prior to the date of the alleged taking.

---

[3]Compounding the error, as well as the interest, the Magistrate found the taking occurred upon the enactment of the comprehensive plan on December 21, 1984 awarding prejudgment interest from that date. Of course a final decision as to how the comprehensive plan would be applied to Petitioners' property was not rendered until September 19, 1990.

SUMMARY OF ARGUMENT

Federal courts are courts of limited jurisdiction whose subject matter jurisdiction is founded upon Article III. In order for a federal court to have subject matter jurisdiction to adjudicate a Fifth Amendment taking claim, there must first be a violation of the Fifth Amendment. When the application of a regulation is challenged as an uncompensated taking, there is no violation of the Fifth Amendment until a final decision is rendered as to how the regulation will be applied and the claimant has pursued and been denied compensation under available procedure.

Petitioners' suit alleged an uncompensated taking of property under Florida law and the Fifth Amendment. This prematurely filed suit was improvidently removed to federal court with Petitioners' consent. At the time the final decision regarding the regulations application to Petitioners' property was rendered, any doubt as to the existence of a Florida inverse condemnation remedy was removed. Until Petitioners pursue their state inverse condemnation remedy and are denied compensation, there is no Fifth Amendment taking and no basis for federal jurisdiction.

REASONS FOR DENYING THE WRIT

I. THIS COURT'S DECISION IN *LUCAS* DID NOT IMPLICITLY ABROGATE THE REQUIREMENTS OF A FINAL DECISION AND DENIAL OF COMPENSATION AS THE *SINE QUA NON* OF A

FIFTH AMENDMENT REGULATORY TAKING CLAIM.

In order to state a cause of action for a Fifth Amendment regulatory taking which may be adjudicated in federal court, a claimant must fulfill two prerequisites.[4] First, the claimant must show that he has obtained a "final and authoritative determination of the type and intensity of development legally permitted on the subject property" *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). Second, if a State provides an adequate procedure for seeking compensation, a claimant cannot state a Fifth Amendment taking claim in federal court until he has used the procedure and been denied just compensation. This latter requirement is premised upon the fact that "the Fifth Amendment proscribes takings without just compensation, [and] no constitutional violation occurs until just compensation has been denied" *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 n. 13.

While "ripeness" may be premised upon prudential concerns in other contexts, in the context of Fifth Amendment regulatory taking jurisprudence, it is premised upon the substantive constitutional principle embodied in the Fifth Amendment's Just Compensation Clause. The final decision requirement "is compelled by the very nature of the inquiry required by the Just Compensation Clause" and is concerned with "whether the initial decision maker

---

[4]Contrary to Petitioners' characterization of these prerequisites as "procedural requirements," finality and denial of compensation are necessary prerequisites for the accrual of a Fifth Amendment taking claim.

has arrived at a definitive position on the issue that inflicts an actual, concrete injury" *Williamson*, 190, 194. Moreover, there is simply no constitutional violation until just compensation has been denied *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21 (1984).

Petitioners argue that this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886 (1992) impliedly receded from the precedent of *Williamson, supra.*, *MacDonald, supra., Ruckelshaus, supra.* and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) and altered Fifth Amendment jurisprudence by abrogating the prerequisites of finality and denial of just compensation. For this remarkably broad assertion, Petitioners rely upon an excerpt from the *Lucas* text dealing with a special permit procedure made available after the case was argued before the South Carolina Supreme Court.

This Court's decision in *Lucas* does not constitute a reversal from *Williamson*, *MacDonald*, or *Penn Central*, nor does it have any bearing on whether Petitioners had an adequate state compensation remedy available at the time a final decision was rendered. On the contrary, this Court's determination that *Lucas'* temporary taking claim was ripe is consistent with *Williamson*, *MacDonald*, and *Penn Central*.

In *Lucas*, Lucas pursued and was denied compensation through state court. Lucas met the prerequisite of being denied compensation when the South Carolina Supreme Court denied his claim on the merits. Additionally, there was no dispute as to how the 1988 act would be finally applied to Lucas' property - no development was permitted nor was there any avenue by

which to obtain any development approval. For purposes of stating a temporary taking claim due to the application of the 1988 act to his property, Lucas stated a ripe Fifth Amendment regulatory taking claim. The late-created special permit procedure made available after the case was before the South Carolina Supreme Court, by a 1990 statutory amendment, could not undo the fact that the final application of the 1988 act denied any development rendering the property valueless and useless for at least a two year period.

For purposes of stating a temporary regulatory taking claim under the Just Compensation Clause, Lucas stated a ripe claim by meeting the prerequisites of finality and denial of compensation. Even though Lucas stated a claim ripe under the Fifth Amendment, the Court could have exercised its discretion under "prudential ripeness" and declined to hear the case until Lucas pursued the late-created special permit. Conversely, if there is no final decision and denial of compensation in state court, there is no violation of the Just Compensation Clause. Absent a federal constitutional violation, there is no basis for federal jurisdiction.[5] Contrary to Petitioners' argument, there is no basis for prudential or discretionary federal jurisdiction when a claimant asserting a Fifth Amendment regulatory taking claim does not meet the prerequisites of finality and denial of compensation.

---

[5]Federal courts are courts of limited jurisdiction and subject matter jurisdiction is a requirement of Article III *Insurance Corp. Of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

II. THE EXISTENCE OF A COMPENSATION PROCEDURE UNDER FLORIDA LAW PRECLUDES PETITIONERS' FROM ASSERTING A FIFTH AMENDMENT TAKING CLAIM IN FEDERAL COURT.

It has been said that ripeness is "peculiarly a question of timing" *Thomas v. Union Carbide Agricultural Products, Co.*, 473 U.S. 568, 580 (1985). This is particularly true in the context of Fifth Amendment takings claims.

In September, 1989, Petitioners filed suit alleging the application of the Lee County land use plan to their mangrove wetland constituted a taking without compensation in violation of the Florida and United States Constitutions.[6] They did so prior to obtaining a final decision as to how the regulation will be applied to their property. A final, authoritative determination of the intensity of development permitted on the property is an "essential prerequisite" to a justiciable Fifth Amendment taking claim *MacDonald, supra.* at 348. Petitioners' Fifth Amendment claim was unripe for lack of finality and premature. Moreover, Florida law requires finality and pursuit of available variances before a Florida inverse

---

[6]Shortly after the filing of this premature suit, Lee County, with the consent of Petitioners, removed the suit to federal court. Neither Lee County nor the Petitioners appreciated the inherent jurisdictional defect that existed in pursuing a state compensation claim along with a Fifth Amendment taking claim. This defect went unnoticed by the trial court which denied Lee County's motion to strike the prayer for jury trial and attorney's fees on the ground the complaint states both federal constitutional and state law claims and under Florida inverse condemnation law, jury trial and attorney's fees are permitted. (Appendix A to Respondent's Response.)

condemnation claim becomes ripe *Martinez v. Bolding*, 570 So.2d 1369, 1371 (Fla. Dist. Ct. App. 1990), *review denied* 581 So.2d 163 (Fla. 1991); *Glisson v. Alachua County*, 558 So.2d 1030 (Fla. Dist. Ct. App. 1990) *review denied* 570 So.2d 1304 (Fla. 1990). Petitioners did not obtain a final decision until September 19, 1990 when the Lee County Board of County Commissioners issued the development order for a single family home. That is the operative date for takings analysis, as it was on that date the land use plan was definitively applied to Petitioners' property. Prior to that date, neither the state inverse condemnation claim nor the Fifth Amendment taking claim accrued. As this Court noted in *Williamson, supra.* at 194 "all that is required [under the Fifth Amendment] is that a 'reasonable, certain and adequate provision for obtaining compensation' exists at the time of the taking" (citations omitted).

Prior to September 19, 1990, the date of the final decision, no less than the Florida Supreme Court in *Joint Ventures, Inc. v. Department of Transp.*, 563 So.2d 622 (Fla. 1990) reconfirmed the existence of Florida's inverse condemnation remedy previously recognized in *Palm Beach County v. Tessler*, 538 So.2d 846 (Fla. 1989) (recognized inverse condemnation when government action causes a taking of property rights without physical appropriation).

Since Florida provided an adequate procedure by which Petitioners could seek compensation, until Petitioners have been denied compensation, there is no violation of the Just Compensation Clause.

On September 19, 1990, Petitioners obtained the final decision necessary to state a claim for inverse condemnation under Florida law and to satisfy the finality

requirement of *Williamson*. Petitioners had an available state court compensation remedy to pursue on September 19, 1990[7] which renders a Fifth Amendment taking claim unripe until compensation is denied.

---

[7]The Magistrate not only acknowledged the existence of a state inverse condemnation remedy, he adjudicated it and awarded prejudgment and post-judgment interest at the Florida statutory rate since Petitioners prevailed on their state compensation claim (Appendix B to Respondent's Response).

CONCLUSION

Petitioners' argument is subtly couched so as to appeal to the Court's sense of equity and mischaracterizes this case as a classic example of how "procedural requirements" make it virtually impossible for a claimant to vindicate his Fifth Amendment rights. A myopic reading of one sentence in *Lucas* serves as the basis for Petitioners' argument that this Court impliedly modified the fundamental principle embodied in the Fifth Amendment Taking Clause that unless compensation is denied, there is no constitutional violation. Petitioners invite this Court to reverse the precedent of *Penn Central*, *Williamson*, and *MacDonald* to fashion a rule that will permit a claimant to assert a Fifth Amendment taking claim without obtaining a final decision how the regulation will be applied to his property and without the claimant being denied compensation. This invitation should be denied not only because such a rule would expand the Fifth Amendment taking clause beyond recognition, it would also erode the precept that federal courts are courts of limited jurisdiction.

Respectfully submitted,

JOHN J. RENNER
Assistant County Attorney
Counsel of Record
JAMES G. YAEGER
LEE COUNTY ATTORNEY
Attorneys for Respondent
2115 Second Street
Fort Myers, Florida 33901
(813) 335-2236

APPENDIX

BEST AVAILABLE COPY

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RICHARD REAHARD,

Plaintiff,

-vs- CASE NO. 89-227 CIV-FtM-10(C)

LEE COUNTY,

Defendant.
_____/

ORDER

Plaintiff brings this action for inverse condemnation against the defendant Lee County, Florida. Plaintiff alleges that Lee County precluded him from developing 35 acres of waterfront property which he owns in Lee County by classifying the property as a "resource protection area." The County's action, contends plaintiff, amounts to a taking without compensation and violates the fifth and fourteen amendments of the United States Constitution, the Florida Constitution, and Florida Statute §163.3194(4)(b) and §380.08. Two motions are presently before the Court.

I. Defendant moves either to dismiss plaintiff's complaint for failure to state a claim or to obtain a more definite statement. Defendant also seeks to strike plaintiff's

claim for attorney's fees and his demand for a jury trial. Plaintiff has responded. Defendant's motion is due to be denied.

Plaintiff's complaint states a claim of inverse condemnation: plaintiff alleges that Lee County's classification of plaintiff's property precludes all economically reasonable use. Moreover, the Court does not find that a more definite statement is required in order for defendant to form a responsive pleading.

Plaintiff's claim for attorney's fees and his demand for a jury trial also should remain. The complaint appears to assert both federal constitutional as well as state law claims; and under state law, plaintiff has a right to a jury trial on the question of what constitutes just compensation. Department of Agriculture & Consumer Services v. Mid-Florida Growers, Inc., 521 So.2d 101 (Fla. 1988). Florida law also provides attorney's fees may be awarded in an inverse condemnation case. County of Volusia v. W.R. Pickens, 435 So.2d 247 (Fla. 5th DCA 1983).

Accordingly, defendant's motion to dismiss and to strike is DENIED.

II. Plaintiff moves to amend his complaint to add his wife, Ann P. Reahard, as a party. Defendant has stipulated to the addition of Ms. Reahard. Plaintiff has not submitted a new pleading incorporating his amendments as required by Rule 4.01, M.D. Fla. Rules.

Accordingly, plaintiff's motion to amend his complaint is GRANTED, and Ann P. Reahard shall be deemed to be jointed as a party plaintiff as of the date of this Order.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 21st day of March, 1990.

WILLIAM TERRELL HODGES
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RICHARD REAHARD, et al.,
Plaintiffs,
vs. CASE NO. 89-227-CIV-FTM-23D

LEE COUNTY,
Defendant.
_____/

ORDER

This Cause is before the Court on the defendant's Motion to Alter or Amend Judgment (Doc. 135). The Court has carefully reviewed the file and the submissions of the parties and has determined that the above motion must be decided prior to the appeal being completed.

According to the Motion, the County raises the following issues: a) that this Court is prohibited from reinstating the previous final judgment because the Court of Appeals vacated it and therefore it is a nullity; and b) this Court erred in awarding prejudgment interest at the rate of 12% because the plaintiffs' had no state court remedy and the Federal Statutes upon which this cause is based do not provide for prejudgment interest at the rate of 12%. The plaintiff argues that this Court is able to reinstate the final judgment and award prejudgment interest at the rate of 12%.

The Court is unpersuaded by the defendant's arguments. The Eleventh Circuit Court of Appeals remanded this matter stating this Court failed to make adequate factual findings. Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992) The Court has now made the factual finding required by the mandate which were consistent with the previous judgment and were based on the same factual evidence presented to the Court in the original non-jury trial. The Court finds no reason to hold another jury trial on damages as it would only be duplicative of the previous jury trial, thwart judicial economy and substitute a new jury's verdict with that of the previous jury.

Regarding the question of prejudgment interest, at the time that the case was removed on October 5, 1989, the defendant is correct that in state court, a zoning change did not give rise to a cause of action in damages for inverse condemnation. See, Amended order of Taking Following Remand (Doc. 130) However, shortly thereafter in April of 1990, subsequent to the removal, the state of Florida did recognize a cause of action for damages in inverse condemnation cases involving zoning changes. Id. Therefore, at the time that the judgment was entered in this matter, a cause of action existed in Florida. Florida does award prejudgment interest in inverse condemnation cases. See, County of Volusia v. Pickens, 439 So.2d 276 (5th DCA 1983). Plaintiffs brought this action under both the Constitution of the United States and the Constitution of the State of Florida.

Therefore, it is hereby ORDERED:

That the Motion to Alter or Amend Judgment (Doc. 130) is hereby DENIED.

DONE AND ORDERED in Chambers, Fort Myers, Florida, this 16th day of June, 1993.

GEORGE T. SWARTZ
UNITED STATES MAGISTRATE JUDGE